The question whether the Minister had made an order for the detention of the detainee from 6 August was therefore not answered with any certainty or reliability. An order is therefore made for a writ of *Habeas Corpus* to issue.

Order accordingly.

Solicitors: *Karpal Singh, Wong & Co.*

MAHESAN v. MALAYSIAN GOVERNMENT OFFICERS CO-OPERATIVE HOUSING SOCIETY LTD.

[F.C. (Azmi L.P., Suffian C.J. (Malaya) and Syed Othman J.) February 28, 1974]

[Kuala Lumpur — Federal Court Civil Appeal No. 70 of 1972]

Contract — Principal and Agent — Agent accepting bribe and inducing principal to enter into contract with person who has paid bribe — Agent causing loss to principal — Claim by principal to recover bribe and for loss or damage — Prevention of Corruption Act, s. 30 — Contracts (Malay States) Ordinance, 1950, s. 165.

Agency — Secret commission, bribe and compensation — Recovery by principal.

Co-operative Societies Ordinance, 1948 — Cooperative society a body corporate — Director agent of society — Liable to society for bribes or secret commissions and for loss or damage.

In this case the facts alleged against the appellant a director and secretary of the respondent co-operative society was that he knowing that the vendor of certain lands in Penang had purchased it for $456,000 failed to disclose to the society the transaction; that as a result the society purchased the land for $944,000; and that he after the purchase of the land without the knowledge and consent of the society received for himself the sum of $122,000 as a bribe or secret commission. The respondent society claimed compensation for loss or damage suffered by it and also the secret commission. The learned trial judge gave judgment on the claim for secret commission but dismissed the claim for compensation. The appellant appealed against the judgment on the secret commission and the respondent society cross-appealed against the dismissal of the claim for compensation.

Held, dismissing the appeal and allowing the cross-appeal:

(1) on the facts, the learned trial judge was justified in holding that the money received by the appellant was a secret commission from the vendor;

(2) the law is that where an agent who has been bribed to do so, induces his principal to enter into a contract with a person who has paid the bribe and the contract is disadvantageous to the principal, the principal may recover from the agent the amount of the bribe which he has received and therefore in this case the learned trial judge was right in holding that the respondent society was entitled to recover the secret commission received by the appellant;

(3) the authorities show that the principal is entitled to recover from the agent both the bribe and compensation for loss suffered by the principal and in this case as the facts showed that the loss suffered by the respondent society was the direct result of the appellant's misconduct or breach of duty, the respondent society was entitled to get compensation from the appellant.

Cases referred to:-

(1) *Tan Chow See* v. *Ratna Amnal* [1969] 2 M.L.J. 49.

(2) *Ferguson* v. *Wilson* (1866) L.R. 2 Ch. 77.

(3) *Aberdeen Railway Company* v. *Balikie Brothers* (1854) 1 Macqueen 461.

(4) *Mayor, Alderman and Burgesses of the Borough of Salford* v. *Lever* [1891] 1 Q.B. 168.

(5) *Hovenden and Sons* v. *Millhoff* 83 L.T.R. 41.

(6) *Maneklal* v. *Jwaladutt* A.I.R. 1947 Bombay 135.

(7) *N. Purkavastha* v. *Union of India* A.I.R. 1955 Assam 33.

(8) *Gambhirmull* v. *Indian Bank Ltd.* A.I.R. 1963 Calcutta 163.

(9) *Christoforides* v. *Terry* [1924] A.C. 566.

(10) *Grant* v. *Gold Explanation and Development Syndicate* [1900] 1 Q.B. 233.

(11) *Taylor* v. *United Africa Co. Ltd.* A.I.R. 1937 P.C. 10 and 78.

FEDERAL COURT.

V. C. George for the appellant.

Raja Abdul Aziz Addruse for the respondent in the appeal.

Peter Mooney for the respondent in the cross-appeal.

Syed Othman J.: The appellant was a director and secretary of the respondent society (the society). The allegations against him were that he knowing that the vendor, one Manickam, had purchased 59 acres of land in Penang for $456,000 failed to disclose to the society the transaction; that as a result, the society purchased the land in February, 1965 for $944,000; and that he after the purchase of the land without the knowledge and consent of the society received for himself from Manickam a commission totalling $122,000 made up of 2 payments: $82,000 on 13th May, 1965 and $40,000 on 29th June, 1965. The society claimed loss or damage *i.e.* $488,000 excess payment for the purchase of the land and $122,000 the secret commission.

The appellant in his defence denied knowledge that the land had been purchased for only $456,000 or that he had received for himself a commission of $122,000.

The learned trial judge, after a trial lasting 8 days, gave judgment on the claim for secret commission but dismissed the claim for compensation of $488,000.

The appellant appeals against the judgment on the secret commission and the society cross-appeals against the dismissal of the claim for compensation.

I think it is necessary to set out in some detail the two versions of the story in order to follow my grounds in the appeal and the cross-appeal.

The case of the society at the trial may be put briefly as follows. In 1964, a co-owner of the land gave one Rengasamy an option for sale of the land at $8,000 per acre. The total area of the land was 62 acres 0 rood 25 poles. In May, 1964 one Periasamy, since deceased, who was known to Rengasamy came to see him in Penang. He telephoned Manickam in Kuala Lumpur. Rengasamy also spoke to Manickam on the telephone and told Manickam that he had an option for $8,000 per acre but would not sell the land for less than $10,000. Periasamy returned to Kuala Lumpur on the same night. Manickam telephoned Rengasamy and told him that he would buy the land and that a Chinese would see the land and if he was satisfied another person would buy the land. A few days later the Chinese came to Penang with Periasamy and inspected the land for about one hour. That night Manickam spoke to Rengasamy on the telephone and

told him that he and the appellant would come to Penang from Kuala Lumpur to inspect the land. He informed Rengasamy that the appellant was from the Prime Minister's Department and an important person. 4 or 5 days later Manickam and the appellant came to Penang. Rengasamy met them at the airport. From there they went to the land which was on the way to the town and inspected the land for about half an hour. There was some discussion about the price of the land. Rengasamy asked for $10,000 per acre. Manickam offered $9,000. The appellant then put it at $9,500 per acre. This became the agreed purchase price. Rengasamy wanted an advance of $10,000. On the appellant's instruction, Manickam issued a cheque for $2,000.

After the visit, Periasamy, the nominee of Manickam, on 29th June, 1964 entered into an agreement with the co-owners of the land for the purchase of the land at the agreed price of $472,000 (pages 403-4 appeal record).

On 6th November, 1964 the owners of the land conveyed the land to Manickam for $456,000. Out of the agreed price $16,000 was deducted in respect of 3½ acres which were used as a grave yard. On the same day, Manickam wrote a letter to the Chairman, Board of Directors of the society offering the land at $16,000 per acre (see page 412 appeal record). On 12th November, 1964 (page 413) the appellant wrote to the State Planning Officer, Penang stating that the society "has negotiated" for the purchase of the land and enquired whether the land was suitable for development of housing for government officers. The heading of the letter gives the area of the land as 62.0258 acres. On 27th November, 1964 the board of directors held a meeting. One of the matters discussed was this offer. According to the minutes (pages 408-9 appeal record), the appellant reported the offer, that he had written to the State Planning Officer, Penang, and that as there was no reply to the letter he had spoken to the officer on the telephone and the officer had told him that the land was suitable for bungalow type of houses. The minutes also read the appellant as reporting in effect that the situation in Penang was such that the society could not get land from the Government; it had to purchase private land which was very expensive; land could only be obtained at 9th and 10th mile, where there was no water and electricity supply; and the society had no choice (but to accept the offer). After the chairman had read the letter it was agreed to purchase the land, provided that the reports from the State Planning Officer, an architect and an independent valuer were not adverse. The conveyance of the land to Manickam was registered on 16th December, 1964. On 23rd December, 1964 the board held another meeting, at which the appellant reported that all the directors had agreed in writing to the purchase of the land. As to payments, he explained that the society had to make the first two payments and the balance would have to come from either the Indian Overseas Bank or other co-operative societies. The society then purchased the land. Payment was by five instalments: the first on 15th January, 1965 and the last on 3rd May, 1965 for $122,000. On 13th May, 1965 Manickam issued a cash cheque drawn on the Indian Overseas Bank for $82,000 which was cashed and the cash credited on the same day by one D. Sockalingam, Manickam's clerk, to the appellant's account in the same bank (see pages 425 and 426 appeal record). Then on 29th June, 1965 Manickam issued another cash cheque for $40,000 drawn on the same bank. It was cashed and the cash credited the same day into the appellant's account in the same bank.

The appellant's version may be put briefly as follows. The society could not raise funds. The United Asia Investment Company, of which Dr. Saw was a director, was appointed agent, developer and financier of the society. The appellant learnt about the Penang land in 1964 when Periasamy came to his house with Manickam. He told Manickam he had to look at the land to determine its suitability before he could bring it up to the board. He went to Penang and with Manickam and Rengasamy, he saw the land for about 5 to 10 minutes. Immediately he formed the impression that the land was not suitable as it was "full of squatters and the approach road was narrow". He did not bargain about the price. He came back by train with Manickam. In the train he told Manickam that he was not interested in the land. At the meeting of the board for the purchase of the land, he told the board that he had seen the land and he was not satisfied with the land because of the squatters; that Manickam had at first made an offer of 50 cents per square foot when he had come to the appellant's house and that the offer was for $16,000 per acre and the board should consider it seriously. The appellant did not dispute having received the $122,000 from Manickam but claimed that they were "returns of sums" borrowed by Manickam from Dr. Saw who had been using the appellan"s current account. Dr. Saw was his childhood friend and had been using not only his current account but also his wife's, to use his own words, "for passing his money through deposit and withdrawal". Dr. Saw gave no reason as to why he wanted to use his wife's account. Dr. Saw was interested in setting up a milk factory in India and was sending money abroad through the appellant's account. The appellant had two bank accounts in Kuala Lumpur, one with Hongkong and Shanghai Bank and another with Indian Overseas Bank. He had 3 deposit accounts abroad. I do not think there is need to go any further.

APPEAL

There are 36 grounds of appeal. Most of them deal with questions of facts and they do not appear to me to merit consideration. I do not propose to go through everyone of them.

The only question to be determined in this appeal is whether the $122,000 paid by Manickam into appellant's bank account was a secret commission from Manickam to appellant (as claimed by the society and as found by the learned trial judge) or a payment by Manickam to Dr. Saw (as claimed by appellant).

Encik George for the appellant addressed us for over four days, but his arguments may fairly be summarised as follows. The appellant's wife had $100,000 Malaysian on fixed deposit with Hongkong branch of the Indian Overseas Bank, but this money belonged not to her but to Dr. Saw. The appellant's

wife had an account with the Kuala Lumpur branch of the same bank, but this account was used not by her but by Dr. Saw, who overdrew on it on the security of the money on fixed deposit in Hongkong. Eventually this amount in Hongkong was repaid to Dr. Saw in full, as was shown by a document from the bank. As to the appellant's account with the Kuala Lumpur branch of the same bank, large amounts passed in and out of that account, but it is said that that account too was operated by Dr. Saw and that the appellant was only a nominee; by way of proof some cheques were shown to have been either drawn by Dr. Saw or made payable to Dr. Saw.

Over one million dollars was remitted to India to the appellant's account. The money was later remitted to London and then from London finally remitted to Dr. Saw. It is said that this money too belonged not to the appellant but to Dr. Saw, and by way of proof a document from a bank was produced.

Evidence was produced by the appellant that there had been dealings between Manickam and Dr. Saw. It is said that on that evidence the court could and should have found that Manickam was owing money to Dr. Saw, and that therefore it was more probable than not that the $122,000, which found its way into appellant's account and which admittedly originated from Manickam, was not for the benefit of appellant but was in payment by Manickam of part of the money owed by him to Dr. Saw.

But throughout Encik George quite frankly admitted that there were no contemporaneous written documents evidencing the financial arrangements either between the appellant's wife and Dr. Saw or between the appellant and Dr. Saw; and that such documents as existed and were produced came into being after the alleged events and after the Income Tax Department had become suspicious and started investigation on discovering that large amounts had been passing through the bank accounts of the appellant, a mere civil servant on an annual salary of $23,000. Mr. Chari, an accountant employed by the appellant to look after his income tax affairs, also admitted in evidence that there were no contemporaneous documents to support the appellant's and his witnesses' contention.

Thus in the words of Lord Diplock when giving the advice of the Privy Council at page 50 in *Tan Chow See* v. *Ratna Ammal*.[1]

"... this was a classic example of a case in which the decision depends entirely upon which parts of the conflicting testimony of the witnesses who gave oral evidence before the learned trial judge, at the trial, were to be believed."

His Lordship then continued at page 51:

"... this case turned entirely upon the rival credibility of the defendant [and one witness] on the one hand and the plaintiff on the other. There was, as is to be expected in so devious a transaction, very little documentary evidence to support the story of one side or another...."

I agree with the learned trial judge that it is wholly incredible to accept that the appellant and his wife could be operating nominal accounts for Dr. Saw involving a sum of over a million dollars at some time or other without any contemporaneous document to safeguard the interest of Dr. Saw in the event of sudden demise of the appellant or his wife or Dr. Saw.

To the observations of the learned trial judge on this point, I would add that if the money had in fact belonged to Dr. Saw, I should have thought that when the board of directors was considering the purchase of the land at the meeting on 23rd December, 1964, the appellant would have mentioned that Dr. Saw or the United Asia Investment Company, of which Dr. Saw was a director, would have been in a position to meet the balance after the two first payments towards the purchase price, as on the appellant's own evidence, the company was the developer and financier of the society. But instead according to the minutes, he "explained" that the balance would have to come from the Indian Overseas Bank or other co-operative societies. Since the appellant did not mention that the financier of the society was in a position to meet the balance in circumstances which he should have, the only inference to be drawn is that the money was in fact the appellant's. The fact that the appellant had money is supported by his own evidence. He said that he had bought Diana Estate, 40 acres, in 1962 for $6,000 per acre with his own money and in 1963 or 1964 he sold this land to the society, according to him, at no profit!

I would not also believe that there could be any childhood friendship between Dr. Saw and the appellant. The correspondence between them do not bear this out. They are couched in formalities not showing this friendship, *e.g.* in page 598 of the appeal record Dr. Saw addressed the appellant as "Dear Sir", and in pages 601 and 603 Dr. Saw addressed him as "Dear Mr. Mahesan". It will be observed all these letters were written after the event. To my mind they were made up for the purpose of income tax.

In grounds 10, 11 and 12 it is in effect urged that the learned trial judge erred in finding that the appellant was engaged in the land deal from its inception and that Manickam was to purchase it if the appellant found it suitable to the society having regard to the fact that the land had been viewed by a Chinese and there had been attempts to sell the land to 2 other persons. There is nothing to show that any of these persons was a *bona fide* land developer and was in a position to have purchased the land for his own purpose. As to the Chinese, on the evidence of Rengasamy, he was brought into the picture by Manickam; as far as Rengasamy knew, he would only buy the land if another person was satisfied with the land. He was clearly in the same class of persons as Rengasamy or Manickam *i.e.* a land speculator. It will be observed that immediately after he left Penang, Manickam telephoned Rengasamy and told him that the appellant would visit the land. The two other persons were not called to give evidence. It will also be observed that these three persons came in after Manickam, who had connection with Dr. Saw, who in turn had connection with the appellant, showed an interest in the land. I would therefore be inclined to believe that these attempts were either an eyewash or put up to make the land look "hot" (to use a local expression), so that the society would buy it without further investigation or bargaining. Then the evidence shows that Periasamy, the nominee of Manickam, entered into an agreement with the owners for the purchase of land only after the appellant's visit to the land; and that the convey-

ance was executed on 6th November, 1964 and on that very day Manickam wrote to the society making the offer of sale. Then on 12th November, 1964 the appellant wrote to the State Planning Officer, Penang saying that the society "has negotiated" for the purchase of the land. It is argued that the expression is a grammatical error and was intended to read "is negotiating" as the appellant explained during the trial. Even so, as observed by the learned trial judge, the society did not negotiate at all. To my mind the use of the word "negotiated" by the appellant is indicative of the fact that it was the appellant who had negotiated with Rengasamy for the purchase of the land and shows an underlying anxiety of the appellant that the society should purchase the land. The fact that he was anxious is supported by his own evidence that Manickam had come to his house and offered to sell the land at 50 cents per square foot. This works out to $21,780 per acre (43,560 square foot). By this very evidence the suggestion given to the board was that the offer of $16,000 per acre made by Manickam in writing was cheap. It is also clear from the minutes that the appellant was impressing on the board that as far as Penang was concerned it had no choice but to accept the offer. This evidence contradicts his own story that he had told Manickam in the train after visiting the land that he was not interested in the land because it was unsuitable. That the claim that he was not interested in the land cannot be the truth is further supported by the fact that Manickam paid the deposit of $2,000 on his visit to the land with Manickam and that when Manickam wrote to the society making the offer, he stated that the area of the land was 59 acres, but when the appellant wrote to State Planning Officer on the 12th November, he gave the area of the land as 62.0258 acres, which is about correct. By this it is shown that he knew all the details about the land and the impression he wanted to give to the society and everyone concerned was that the usable part of the land was larger than what it actually was.

At this stage, I think it is necessary to go into one point which has been raised and that is the valuation by Goh Hock Guan and Associates (page 355 appeal record) and by Norman Lehey (page 348). Both gave the value of the land as about the same as the price offered by Manickam to the society. They were not called to give evidence to show as to how this could be so. I would discount the valuation by Goh Hock Guan and Associates as they were only chartered architects and town planners. As to Norman Lehey, although he was also a licensed valuer, I would still discount his valuation as it does not show the basis on which he came to his valuation. He did not collate transactions of lands in the surrounding area and did not even mention the recent transaction concerning the very land he valued. The appellant adduced no evidence to show that land in Penang in the area had jumped up in value to more than double within the few months. The strong impression I have is that it is not by sheer coincidence that the two valuations should have been about the same as the price offered by Manickam and that the appellant did not choose the proper officers of the Government to value the land before the purchase by the society. I see no reason why the valuation officer or the commissioner of lands or the collector of land revenue could not give the valuation report. There is ample evidence to show that the society and the appellant had access to the services of the various Government departments.

Regarding the $122,000, I agree with the finding of the learned trial judge that Dr. Saw or Manickam could not be telling the truth when they said that the sums were in payment of debt by Manickam to Dr. Saw. There was again no contemporaneous written document evidencing any acknowledgment of debt by Manickam to Dr. Saw. It is in evidence that Manickam came to know Dr. Saw only in early 1964 (see pages 44, 189 and 252 appeal record). It is inconceivable that after this short acquaintance, Manickam could have obtained from Dr. Saw and Dr. Saw could have given him a loan of a big sum of money with no security at all and the loan repaid by a method which would not even be evidence of payment. The payment was made surreptitiously and Manickam took great pains to cover his tracks. He did not simply issue a cheque or two cheques to the appellant. Instead he wrote out a cash cheque for $82,000. His clerk cashed the cheque and then immediately deposited the cash into the same bank for the account of the appellant. He did the same thing when paying the $40,000 about a month later. Obviously Manickam was anxious that no body should know where the money had come from least of all that it came from him. Further, the payment was made after the society had paid Manickam the last instalment and the amount was exactly ¼ of the profits made out of the whole transaction *i.e.* $488,000. I do not accept that the figure is a coincidence as submitted by counsel for the appellant. There is nothing to show that Manickam owed Dr. Saw that very sum. Considering all this, I agree with the learned trial judge that the money was received by the appellant as a secret commission from Manickam.

I am also of the opinion that the evidence met the highest standard of proof. I do not therefore think that there is any need to discuss the standard of proof and manner of assessing circumstantial evidence raised in the appeal.

Now as to the law, it is my view that the society, being registered under the Co-operative Societies Ordinance No. 33 of 1948, is a body corporate (section 8 of the Ordinance) and that the appellant being its director and honorary secretary was its agent.

In *Ferguson* v. *Wilson*,[2] Cairns L.C. said at page 89: —

"What is the position of directors of a public company? They are merely agents of a company. The company itself cannot act in its own person, for it has no person; it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agents."

The duties of an agent of a corporate body were stated in general terms by Lord Cranworth, L.C. at page 471 in *Aberdeen Railway Company* v. *Balikie, Brothers*,[3] in the following words: —

"A corporate body can only act by agents, and it is of course the duty of those agents as to act as best to promote the interest of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature

towards their principal. And it is a rule of universal application that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect."

More specifically, the law is that where an agent who has been bribed so to do, induces his principal to enter into a contract with a person who has paid the bribe, and the contract is disadvantageous to the principal, the principal may recover from the agent the amount of the bribe which he has received. This was established by the English Court of Appeal in *The Mayor, Alderman and Burgesses of the Borough of Salford* v. *Lever* (*Salford's* case).[4] There the plaintiff corporation owned gasworks which consumed coal and employed Hunter, their manager, to buy coal at the best terms and Hunter accepted a secret commission of one shilling a ton from the defendant, Lever, a coalmerchant. Lord Esher M.R. stated the law at page 176 as follows: —

"Hunter, [the plaintiff's agent] had received from the defendant, for the performance of a duty which he was bound to perform without any such payment. Nothing could in law be more fraudulent, dangerous, or disgraceful and therefore the law has struck at such conduct in this way. It says that, if an agent takes a bribe from a third person, whether he calls it a commission or by any other name, for the performance of a duty which he is bound to perform for his principal, he must give up to his principal whatever he has by reason of such fraud received beyond due."

Some ten years later, Romer, L.J. (as he then was) elaborated the law in the following words in another Court of Appeal case. *Hovenden and Sons* v. *Millhoff*,[5] at page 43: —

"The courts of law of this country have always strongly condemned and, when they could, punished the bribing of agents, and have taken a strong view as to what constitutes a bribe. I believe the mercantile community as a whole appreciate and approve of the court's views on the subject. But some persons undoubtedly hold laxer views. Not that these persons like the ugly word 'bribe' or would excuse the giving of a bribe if that word be used, but they differ from the courts in their view as to what constitutes a bribe. It may, therefore, be well to point out what is a bribe in the eyes of the law. Without attempting an exhaustive definition I may say that the following is one statement of what constitutes a bribe. If a gift be made to a confidential agent to act in favour of the donor in relation to transactions between the donor and the agent's principal and that gift is secret as between the donor and the agent — that is to say without the knowledge of the principal — then the gift is a bribe in the eyes of the law".

His Lordship then went on to state the legal consequence of a bribe: —

"If a bribe be once established to the court's satisfaction, then certain rules apply. Amongst them the following are now established, and, in my opinion, rightly established, in the interest of morality with the view of discouraging the practice of bribery. First, the court will not enquire into the donor's motive in giving the bribe, nor allow evidence to be gone into as to the motive. Secondly, the court will presume in favour of the principal and as against the briber and the agent bribed, that the agent was influenced by the bribe; and this presumption is irrebuttable. Thirdly, if the agent be a confidential buyer of goods for his principal from the briber, that the true price of the goods as between him and the purchaser must be taken to be less than the price paid to or charged by the vendor, by at any rate, the amount or value of the bribe. If the purchaser alleges loss or damage beyond this, he must prove it."

Does the above common law principle apply in the State of Selangor where the Contracts (Malay States) Ordinance, 1950, apply? That Ordinance is *in pari materia* with the Contract Act that applies in India, and Encik Mooney, on behalf of the society, argues on the authority of three Indian decisions that the law is the same where the Indian Contract Act applies. With respect I agree. The three Indian decisions cited are *Maneklal* v. *Jwaladutt*,[6] *N. Purkavastha* v. *Union of India*[7] and *Gambhirmull* v. *Indian Bank Ltd.*[8] In the first of these cases Chagla J., as he then was, held, relying on *Christoforides* v. *Terry*,[9] that (in the words of the headnote) —

"A principal has three rights as against his agent who fails in his duty — one, to recover damages for want of skill and care and for disregard of the terms of the mandate; second, to obtain an account and payment of secret and illicit profits which have come to the hands of the agent as an agent...." (The third right is not relevant to this appeal).

Then there is the authority of section 30 of the Prevention of Corruption Act 42 of 1961 which conclusively lays down the law in the following terms:

"30. (1) Where any gratification has in contravention of this Act been given by any person to an agent, the principal may recover as a civil debt the amount or the money value thereof either from the agent or from the person who gave the gratification to the agent, and no conviction or acquittal of the defendant in respect of an offence under this Act shall operate as a bar to proceedings for the recovery of such amount or money value.

(2) Nothing in this section shall be deemed to prejudice or affect any right which any principal may have under any written law or rule of law to recover from his agent any money or property."

(In passing it may be stated that the appellant has been convicted by the High Court, which conviction was upheld by this court, of two offences under that Act in respect of the two amounts the subject of this appeal, and sentenced to imprisonment.)

Applying the above law to the facts, in my view, the learned trial judge was correct in finding that the court should not enquire into Manickam's motive in giving the bribe and that the court presumes in favour of the society and against the appellant that the appellant was influenced by the bribe. I would therefore dismiss the appeal.

CROSS-APPEAL

I now come to the cross-appeal. This is against the dismissal of the claim for loss or damage in the sum of $488,000 being excess payment for the purchase of the land.

Salford's case, *supra*, appears to lay down the principle that the principal can recover from an agent both the secret commission or bribe and compensation for loss. The first paragraph of the headnotes in this case reads: —

"Where an agent, who has been bribed so to do, induces his principal to enter into a contract with the person who has paid the bribe, and the contract is disadvantageous to the principal, the principal has two distinct and cumulative remedies: he may recover from the agent the amount of the bribe which he has received, and he may also recover from the agent and the person who has paid the bribe, jointly or severally, damages for any loss which he has sustained by reason of his having entered into the contract, without allowing any deduction in respect of what he has recovered from the agent under the former head, and it is immaterial whether the principal sues the agent or the third person first."

I am aware of course that in that case the claim was by the cheated principal not against their manager and agent but against the briber of the agent, and therefore anything said in that case relating to the liability of an agent to his principal was not strictly relevant, but the principles are intended to apply to both the briber and the agent.

And in a later decision of the Court of Appeal, *Grant* v. *Gold Exploration and Development Syndicate*,[10] A. L. Smith L.J. at page 244 quoted the headnotes of the above case and said that "it accurately describes what was decided thereon." I am aware too in that case the action was by a cheated principal not against his agent but against the purchaser of his property and that anything said relating to the liability of an agent to his principal was not strictly relevant.

From the cases cited, it would appear that hitherto cheated principals have been content to sue their agents only for the return of the bribe received by the agents, and have not sued for more. But the authorities appear to be overwhelming in supporting that the principal is entitled to recover from the agent both the bribe and compensation for loss suffered by the principal.

Paragraph 447 of volume 1 *Halsbury's* Laws of England (Third Edition) has this to say about the effect of the receipt of a bribe by an agent:

"The agent ... becomes liable to his principal for the amount of the bribe ... In addition, the agent is liable ... for any loss actually sustained by the principal in consequence of any breach of duty on the agent's part...."

Encik Mooney, counsel for the society in the cross-appeal, has candidly brought to our attention *Chitty* on Contracts (23rd edition), Volume 2, paragraph 62 (page 34). It reproduces the above rules. The relevant passage with the editor's observations reads: —

"...a principal whose agent has been bribed may recover from the agent the amount of the bribe received, and he may also recover from the agent and the person who paid the bribe, jointly or severally, damages for any loss that he has sustained, without allowing any deduction in respect of what he has recovered from the agent under the former head. The loss sustained by a party to a contract whose agent has been bribed is, in ordinary circumstances, the amount of the bribe. The way in which these rules are stated in the cases seems to allow double recovery, though it does not appear that there has actually been double recovery in any of the cases."

And Romer L.J. in the last sentence of the passage from his judgment in *Hovenden's* case, *supra*, quoted earlier said:

"...If the (principal) alleges loss or damage beyond (the amount of the bribe), he must prove it."

A footnote to the last sentence of the above passage in *Chitty* reads:

"In *Cohen* v. *Kuschke & Co.* (1900) 83 L.T. 102-103 Bruce J. said that the plaintiff cannot, of course, recover the money twice over."

The full report of this case shows that the plaintiff claimed a certain sum paid by the defendant, Kuschke & Co., being a sum paid by way of secret commission to the defendant Koenig, who was engaged as plaintiff's buyer. The court held that both defendants were liable to the plaintiff for the amount of the secret commission and ruled, "the plaintiff cannot, of course, recover the money twice over, but he is entitled to recover it against either or both of the defendants."

I do not think there is any need for me to discuss whether the rules do have the effect of allowing double recovery and the implications of the remarks of Bruce J. as against the rules laid down in *Salford's* case, a decision of the English Court of Appeal. It should be noted that in *Cohen's* case the claim was against the briber and the agent for the sum paid to the agent as secret commission. But in the present case there are two claims against the agent only: recovery of the bribe and damages for loss. The society cannot sue Manickam at the same time because he has absconded to India. Bruce J.'s remarks do not appear to me to be relevant to the present case.

So far as the present case is concerned, I do not think that there should be any suggestion that there would be double recovery of the bribe money if the principal is allowed to recover the bribe money (to which I have held the society is entitled), and then (which is yet to be decided) damages for loss without making any deduction of the bribe, provided, of course, as laid down in *Hovenden's* case, *supra*, there is proof of loss beyond the bribe. The no-deduction rule would be clearly in accordance with *Salford's* case.

It seems to me that the no-deduction rule in damages to be awarded for loss is so laid down in *Salford's* case, because the bribe must not be treated as if it were an advance payment or insurance towards any loss which may be suffered by the principal as a result of the bribing of the agent. The payment of the bribe was intended in the first place to the detriment of the principal. It is to remedy the principal for the wrong that the principal is allowed to recover it. To make it deductible from damages to be awarded for the loss would, in my view, nullify the remedy of recovery and give legal sanction to its payment in that it can be used as a set-off.

The rules are so formulated, I think, because the courts, in the words of Romer L.J. "have always strongly condemned and, when they could, punished the bribing of agents."

In the present case, the society's claim for $488,000 excess payment is based on the appellant's breach of duty in not having informed the society the price Manickam paid for the land and which was within his knowledge; while the claim for $122,000 is based on the appellant's breach of duty in having received it as secret commission.

The claim for excess payment was dismissed on the grounds in effect that the society failed to prove loss and, secondly, as the society still owned the land and had not sold it and it was well known that lands had increased in price during the past 10 years, it was impossible to quantify the alleged loss suffered by the society.

I would like to deal with the second ground first. I am of the opinion that the loss or damage to be considered is at the time of transaction, and not at the time of trial. The fact that the land had appreciated, or for that matter depreciated, in value at the time of

trial is immaterial. Suppose the purchase had been for rubber instead of land. The price of this commodity fluctuates from day to day indeed from hour to hour, and at times sharply. I think the court will be in a most unsettled position if it has to consider the market of the day in determining the amount of compensation for loss caused by an agent in a claim of this nature. I doubt very much if it would be proper to say that since rubber has gone down in price at the time of the trial, the purchasing agent who caused loss to the principal should pay more compensation, or that since rubber has gone up in price at the time of trial the purchasing agent should pay less compensation for loss.

As to the first ground for dismissal of the claim, considering the basis of the claim, the first question to be determined is whether Mahesan committed a breach of duty in the terms alleged and then proof of loss and, if there is such proof, the measure of damages.

To the allegation of breach of duty, Mahesan denied knowledge of the price Manickam had paid for the land. There seems to be no dispute that if Mahesan knew of the price he was under a duty to disclose it to the society.

As to proof of loss and measure of damages, *Halsbury* in the passage quoted above says, so far as applicable to the present case, the agent is liable for any loss *actually* sustained by the principal in consequence of any breach of duty on the agent's part.

Section 165 of the Contracts (Malay States) Ordinance, 1950 also provides:

"... The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequence of his own neglect, want of skill or misconduct...."

Following what Romer L.J. said in *Hovenden's* case, *supra*, there must be proof of loss since the claim is beyond the amount of the bribe.

In *Taylor* v. *United Africa Co. Ltd.*,[11] what Lord Maugham said at page 13 when he came to consider the amount of loss may, I think, be paraphrased as having this effect: When the agent is liable on the footing of negligence or breach of contract the court has to decide whether the existing evidence is sufficient to justify the finding that a loss has been sustained by the principal as the direct or indirect, result of the act, neglect or default of the agent, or whether some loss, and if so what, loss has been proved to have been so occasioned.

It is therefore a matter for the court to determine whether the evidence adduced is sufficient to justify the finding that the loss as claimed was sustained.

What the society says in effect is that if Mahesan had done his duty, the society could have purchased the land for $456,000; *i.e.* the price Manickam paid for it; and it was through Mahesan's breach of duty the society paid $944,000, thereby causing loss to the society in the sum claimed, $488,000.

The question now is, can the denial by Mahesan of knowledge of the true price of the land be accepted? It is established that Mahesan received a big sum of money as secret commission out of the transaction. I would say that an agent who has been bribed cannot be heard to say that he has no knowledge of the transaction connected with the bribe, let alone when the bribe received is a big sum of money as in the present case. The knowledge must be imputed to him. In any event, the findings of the trial court are that Mahesan was in the transaction from the very beginning and that Manickam was to purchase the land if Mahesan found it suitable to the society (see page 238 appeal record). I respectfully agree with these findings. I can see many strong and compelling reasons for the learned trial judge to have come to his findings. I have no doubt that when Mahesan went to Penang with Manickam, (according to Mahesan to see the land) it was for the purpose of bargaining with Rengasamy over the price of the land and securing the land in Manickam's name so that it could be sold to the society. He knew very well that the society would have no choice, as Penang is a small island with limited land space. The evidence also shows that Mahesan took an active part in bargaining over the price with Rengasamy; that it was he who settled the purchase price at $9,500 per acre; that he directed Manickam to pay Rengasamy the deposit of $2,000; and that after Manickam had left Penang, Periasamy, Manickam's nominee, stepped into the picture and signed an agreement with the owners for the purchase of the property (see pages 403-4 appeal record). I have no doubt what Mahesan told the board was only for the purpose of persuading the board not to bargain over the offer of $16,000 per acre, particularly when he told the board that Manickam had at first offered to sell him the land at 50 cents per square foot, and that the board had to buy the land. Then there is the evidence that Mahesan treated as alive the option letter by Manickam to the society, which expired on 20th November, 1964, till January, 1965 without any extension from Manickam.

From the findings, on the evidence that was adduced and considering the parts played by Dr. Saw and Manickam in the whole affair and the active turn over of the accounts of Mahesan and his wife, I am convinced, as I respectfully believe the learned trial judge too although he did not say in so many words, that if there was any milk business to be done, as intended to be shown in evidence, it was to milk the society. It is significant to note that Dr. Saw's "milk venture" in India collapsed after his arrest and Mahesan's in connection with this case (see page 131 appeal record). I have no doubt that Mahesan was the chief perpetrator in the grand design to make money out of the society and Manickam and Periasamy were the front men. To my mind it was because Mahesan had been involved in the transaction from the beginning, not because he did not know the price, he did not inform the board the price that had been paid for the land.

Considering all the circumstances, I would find that Mahesan clearly misconducted himself, and was in breach of duty in the terms alleged. Indeed the evidence does show beyond these terms: that he was acting not only as an agent of the society but also as the vendor of the property and that he engineered the situation in which the society had to purchase the land

at the price offered without proper investigation and any bargaining. I am also satisfied that if Mahesan had conducted himself in the best interest of the society from the beginning, the society could have bought the land direct from the owners through Rengasamy for the price Manickam paid for it ($456,000), if not less. It should be noted that even at the time when Manickam and Mahesan went to Penang to see the land, Rengasamy had not yet agreed to sell the land to Manickam. It was through his misconduct or breach of duty as an agent that Manickam's nominee, Periasamy, entered into agreement for the purchase of the land with the co-owners and that afterwards the land was transferred to Manickam first and then resold to the society almost immediately afterwards for $944,000. To my mind this very payment in the circumstances of the case is proof of loss to the society in the sum of $488,000, and this loss, in the words of Lord Maugham in *Taylor's* case, was actually sustained as a direct result of Mahesan's misconduct or breach of duty.

But from this sum, the amount spent on the clearing of squatters must be deducted, as the society would have to spend on this if it had purchased the land from the beginning. If I am not mistaken the amount shown for this expenditure is $45,000: see letter at page 724 of the appeal record.

I would therefore allow the cross-appeal and order Mahesan to pay the society compensation in the sum of $488,000 less $45,000 = $443,000 with interest at 5½%.

Appeal dismissed.

Cross-appeal allowed. Mahesan to pay compensation in the sum of $443,000 with interest 5½%.

Costs of claim for compensation in the court below, costs of the appeal and the cross-appeal and deposit to the society.

Azmi L.P. and **Suffian C.J.** concurred.

Order accordingly.

Solicitors: *Ng Ek Teong & Partners; Rithauddeen & Aziz.*

ROSLAN BIN KARIM & ORS. v. PUBLIC PROSECUTOR

[A.Cr.J. (Mohamed Azmi J.) September 13, 1974]
[Kuala Lumpur — Selangor Criminal Appeal Nos. 206, 213 & 201 of 1973]

Criminal Law and Procedure — Duty of defence to call witnesses in criminal trial — Failure to call witness — Adverse presumption.

There is no duty casts upon the defence in a criminal trial to call any witness and no adverse presumption should arise against an accused person for failure to call any particular witness.

Case referred to:-

(1) *Tan Foo Su* v. *Public Prosecutor* [1967] 2 M.L.J. 19 @ 20.

CRIMINAL APPEAL.

First appellant in person.

P. G. Segran for second appellant.

Inderjit Singh for third appellant.

Manjeet Singh (Deputy Public Prosecutor) for respondent.

Mohamed Azmi J.: The three appellants in this case were jointly charged in the Sessions Court Kuala Lumpur for armed robbery in furtherance of a common intention, an offence punishable under section 392 of the Penal Code to be read in conjunction with section 397. According to the evidence of the complainant, a caretaker of a brothel at Flat No. 62-4C Jalan Hicks, Kuala Lumpur, three persons walked into the brothel at about 9.00 p.m. on September 1, 1973, and one of them whom he identified as the first appellant (Roslan) dragged him into a room where he was assaulted and relieved of $180 cash at the point of a gun. Whilst this was going on, the other two persons alleged to be the second and third appellants stood guard — one in the hall and the other at the corridor. On the evidence before him, the learned President found all the three appellants guilty as charged and sentenced the first appellant to five years imprisonment and a fine of $1,000 in default one year's imprisonment in addition to six strokes of the rottan. As for the second appellant (Ali) and the third appellant (Wahab), he sentenced each of them to four years' imprisonment and a fine of $1,000 in default one year's imprisonment plus four strokes of the rottan. Before me, the first appellant has now appealed against sentence whilst the second and third appellants appealed against both conviction and sentence.

In this case, I find no merit in the appeal against sentence by the first appellant. He had four previous convictions for robbery and armed robbery and, in my view, the learned President had considered all relevant matters before passing sentence, and there is no ground why the sentence should run concurrently with the terms of imprisonment which the appellant was then serving. I would therefore dismiss the appeal of the first appellant and affirmed the sentence imposed by the learned President.

As regards the second and third appellants, who are members of the police force, the main ground of appeal against conviction is on the question of burden of proof which the learned President had placed on the defence. The defence of the second appellant was that he was at the scene of crime but denied taking any part; whilst the defence of the third appellant was one of alibi, in that he was on beat duty at Sungai Besi Town at the material time.

In his grounds of judgment, the learned President, firstly, criticised the defence for not calling witnesses to substantiate their story and, secondly, he had misdirected himself by requiring the appellants to establish their innocence. Thus, in dealing with the second appellant's story that his wife followed him to Kuang, the learned President had this to say:

"Why did he not call her as a witness? She could have corroborated his story.... I could hardly believe his story. I held he was not speaking the truth and that he failed to